June 22, 2001

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02210

RE: DTE 01-21, Regulations regarding non-minimal use Sanitary Code violations

Dear Secretary Cottrell:

The Low-Income Energy Affordability Network (LEAN) appreciates this opportunity to comment on changes to 220 CMR 29.00 proposed by the Department of Telecommunications and Energy (Department). The regulation addresses the respective responsibilities of landlords, tenants and utility companies when a residential landlord has been cited for violations of state Sanitary Code provisions contained in 105 CMR 410.254 and 410.354. These latter provisions require that residential meters in a multi-family building must measure only the energy consumed in each individual dwelling unit if the tenants are responsible for the bills.

LEAN is a voluntary association of the agencies of the Low-Income Weatherization and Fuel Assistance Program Network, which is described in G.L. c. 25, §19. LEAN implements about $20 million annually of low-income efficiency measures pursuant to programs sponsored by Massachusetts electric and gas utilities, the U.S. Department of Energy, and the Massachusetts Department of Housing and Community Development. LEAN's member agencies are deeply rooted in low-income communities and in this country's commitment to ameliorating the causes and burdens of poverty. They are keenly aware of the difficulties that low-income families face in paying their utility bills.

In essence, the Department's proposed changes require the utility company to estimate the amount of harm the tenant has suffered in the event the landlord has violated 105 CMR 410.354. The Department will require utilities to estimate the cost of utility service for the those appliances or uses improperly connected to the meter for which the tenant is responsible. This amount is then credited to the tenant customer and charged to the landlord's account.

LEAN urges the Department not to revise the bright line rule currently contained in 220 CMR 29.00. Currently, the rule shifts responsibility for paying all of the utility bills to the landlord (retrospectively, for as much as two years and prospectively, until the landlord corrects the violation) if

the landlord commits a "non-minimal" violation of the Sanitary Code.[1] Thus, the utility company does not need to estimate the amount of usage improperly billed to the tenant as a result of the Sanitary Code violation. However, the landlord may seek an exception from the bright line rule in appropriate cases. *See, e.g., Petition of Mario Moruzzi & Mo-del Landscape Inc. v. Commonwealth Gas Co.*, DTE 96-AD-6 (2001)(Department abated initial bill to landlord of $1802 to $66, due to minimal burden imposed on tenant's bills). Landlords already have a remedy if applying the rule strictly causes undue burdens.[2]

The Department's proposed amendments are motivated by a desire to strike a reasonable balance between its interest in "enforc[ing] these [metering] provisions of the [Sanitary] Code" while not "unduly penaliz[ing] an owner of a building or . . . unduly profit[ing] a tenant in a dwelling" in which a violation occurs. *Moruzzi, supra*. While the Department's proposal will eliminate any possibility of tenant windfalls, that should not be the Department's only goal. The existing regulations already provide a mechanism that allows landlords to avoid paying tenant windfalls. 220 CMR 29.13 (relied upon in *Moruzzi* to provide relief to the landlord). Further, the Department's proposal burdens both utilities and tenants when neither is at fault. The utility will bear the burden of having to fairly allocate disputed usage amounts between the landlord and tenant. The burden includes both the effort to estimate the usage in dispute and the more significant legal burden of justifying or explaining the estimate to the Department in a hearing, should either the tenant or the landlord dispute the company's estimate. Under the existing rule, the utility company has no such burden because the bright rule simply requires the company to calculate the entire bill for the relevant time period.

Tenants are burdened, even though they are not at fault, because they must now become versed in the arcana of appliance consumption data, heating degree day data and billing parameters in order to review the utility's calculation. They must also carry a heavy burden at administrative hearings if they wish to challenge the utility's estimate.

The Department should bear in mind that the Department of Public Health, which has jurisdiction to adopt and revise the Sanitary Code, has already made the determination to impose strict burdens on landlords to properly and individually meter their apartments, unless utilities are included in the rent. The proposed amendments to 220 CMR 29.00 make those requirements somewhat toothless. The landlord who fails to comply with the Code and who is not caught pays no price and gains the windfall of illegally shifting utility costs to tenants. Even the landlord who is caught pays a penalty no greater than what he should have paid in the first instance. This scheme provides little

---

[1] See 220 CMR 29.08(1) for the minimal-usage definition and payment rules.

[2] If the disputed use includes heating load, the utility will have to use heating degree day data for the relevant time periods and develop usage allocators.

incentive for landlords to invest in correcting metering problems, prior to being cited for a Code violation. In the aggregate, the new rules will provide windfalls to landlords as many will not be cited at all for Code violations and those who are cited will pay no penalty other than disgorging amounts they illegally gained.

The existing rules should not be revised. They already allow a landlord who would be unfairly burdened to seek a waiver. The existing rules also act as a reasonable deterrent for those landlords who would otherwise take no action to correct the Code violations until they are actually cited.

LEAN appreciates the opportunity to offer these comments and reserves its right to file reply comments by July 3, 2001, in accordance with the May 25 Order in this docket.

Respectfully submitted,

Charles Harak, Esq.
Jerrold Oppenheim, Esq.
Attorneys for LEAN